

June 19, 2012

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary Federal Communications Commission The Portals 445 12th Street, S.W. Washington, DC 20554

Re: Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC for Consent to Assign Licenses and Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses, WT Docket No. 12-4

Dear Ms. Dortch:

On behalf of Information Age Economics (IAE) this letter provides a response to Verizon Wireless and SpectrumCo's ex parte letter of June 11 that was critical of IAE's ex parte filings of May 24 and May 29 in this proceeding.

Verizon and four major cable MSOs (the Applicants) have proposed a number of transactions now under review by the FCC and the DOJ that include a spectrum transfer and various Commercial Agreements as well as the establishment of a Joint Operating Entity. IAE recently submitted *ex parte* filings opposing all of these proposed inter-related business transactions. We provided ample evidence of the harm that the implementation of these collaborative and cooperative, non-competitive, relationships between five major broadband operators, would cause to consumers and competition in the telecommunications-information-entertainment (T-I-E) sector, and the US economy as a whole.

The IAE study identified the specific, unavoidable, and widespread damaging consequences for the competitive health of, and innovations dependent upon, the US broadband market if the proposed collaborative and cooperative business transactions were to be approved. The IAE report was based upon evidence and analyses exposing:

- (1) The spurious content of several of the core claims and assertions being advanced by the Applicants to justify these transactions.
- (2) The connections between the Applicants' past and continuing actions, along with behavior that establish their unmistakable strategic purpose and tactics which, post-transaction, would lead inevitably to monopolies and monopsonies in some crucial segments of the broadband market, and collusive duopolies in others.
- (3) Evidence that the US was already clearly NOT a leader in global broadband rankings of performance and pricing, and that this position would only worsen over time in a US broadband market controlled by two cartels, one involving Verizon and the other AT&T.

We expected that Verizon and its allies would launch a vigorous rebuttal of our positions. Therefore we were not surprised to see such a rebuttal.

However, we are astonished at the unsubstantiated contents and claims of the rebuttal. They constitute a remarkable combination of fuzzy thinking, devoid of logic and rigor. They exhibit a careless or willful disregard of truth and commonsense, while presenting misleading and gross distortions of our positions. Furthermore, they indicate a profound ignorance of, or blindness to, the facts and the implications of the analyses we presented.

The applicants describe our opposition as consisting of an "array of off-base claims". We can only assume that the base from which they perceive that we are "off base" is itself wrapped in a one-way "bubble" reflecting a view of the Applicants' own interests rather than the much more extensive and relevant interests of the American public, as well as other businesses that are either competitors or customers of the Applicants products and services. This "bubble" allows their fulminations to be transmitted to the outside, while forming an impervious barrier to their recognition of the facts about and experiences from other key stakeholders, for example customers, smaller competitors, over-the-top players, and additional public and private sector interests located outside their bubble.

We offer the following assessments of the Applicants' rebuttal, both to reiterate IAE's key findings and to set the record straight. We first address the key points in our *ex parte* that they decided to completely ignore, followed by our responses to the criticisms of the evidence and arguments that they selectively chose to address. The reason we have chosen this approach is that the criticisms that they ignored are likely those that they cannot rebut, which makes them more critical to those charged with reviewing the Applicants' proposed collaborative and cooperative (not competitive) business ventures.. Furthermore, the arguments that the Applicants do attempt to rebut are handled by the parties in such a clumsy a fashion as to be readily dismissed, meaning that they are also unable to successfully rebut them.

A. Evidence ignored by Verizon

Measure of Spectrum Efficiency

Applicants make no attempt to rebut IAE's demonstration (see the letter to Marlene H. Dortch, May 29, 2012 from Alan Pearce) of the meaningless measure of spectrum efficiency that Verizon uses, and has repeated, in another recent filing¹ and hence of the spurious nature of its claims of superiority in this domain. We can only speculate why. Most of the evidence and analyses that we presented is characterized and dismissed without justification as "meritless" or "irrelevant." But of course the question of spectrum efficiency is manifestly not "irrelevant" to consideration of the need for additional spectrum, which is one of the core justifications Verizon has presented to validate its application for a spectrum transfer to it from SpectrumCo and Cox.

http://apps.fcc.gov/ecfs/document/view?id=7021922140

If the basis on which we have refuted the validity of Verizon's preferred measure of spectrum efficiency is "meritless," Verizon should say so and produce some rational basis to support this assertion. Verizon would also have to explain away our finding that, using Verizon's own definition and algorithm for calculating its value, China Mobile emerges as more than three times as efficient as Verizon according to this measure of spectrum efficiency. We do not believe that such is the case, just as there is no reason to believe Verizon's claims about its superior spectral efficiency, based on this same metric. We wonder if Verizon itself would acknowledge that it is less than one-third as efficient as China Mobile and, if not, why its measure of spectrum efficiency should apply in the US but not in China

Monopoly Supply of Fixed Broadband

The Applicants also do not dispute our finding or make any comment about the fact that there are already several metropolitan areas within the US where there is a monopoly supplier, namely one of its proposed new cable TV allies, offering fixed broadband services at speeds that are increasingly becoming the norm, as well as the expected average worldwide, namely above 3-5 Mbps download² (See the Appendix for further information). This finding is linked to the clear evidence that IAE presented that the product planning, business and sales and marketing decisions of Verizon Wireless and Verizon Wireline are inextricably interwoven and mutually interdependent, despite Verizon's implausible and counter-intuitive protestation to the contrary³. Hence it is more likely than not that that these areas of monopoly supply will be maintained, and even expanded, by Verizon's future choices not to expand its current coverage areas for FiOS deployments.

Verizon's protestations in this matter are one, perhaps even the most egregious, example of its tactic of dismissing any evidence that it cannot rebut as either irrelevant, or in this case "unrelated" to its proposed transactions with cable MSOs.

Verizon repeatedly and relentlessly asserts that there are no connections between Verizon Wireline and the proposed transactions between Verizon Wireless and the four cable multiple system operators (MSOs). We have conclusively refuted this assertion on multiple grounds in our *ex parte* filing, using evidence among other sources from Verizon's own product offerings and announced plans. This is yet another issue which Verizon has chosen to ignore in its attempt to rebut our opposition.

Relevance of the 2002 Acquisition of AT&T Broadband by Comcast

Verizon presents no explanation of why its position in 2002 opposing the acquisition of AT&T's cable assets by Comcast in 2002 that perfectly mirrors, and indeed anticipates the concerns of IAE and other

² These speeds only correspond to Tier 3 in the FCC's most recent definition of broadband speed tiers which is reproduced in Appendix 1, from the FCC's report and Order 08-89 (March 19, 2008) at http://hraunfoss.fcc.gov/edocs public/attachmatch/FCC-08-89A1.pdf

Ex parte filing to the FCC by the five companies, January 18, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021755383

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opponents expressed in this Proceeding is "unrelated" to the more significant and extensive set of transactions in 2012 between Verizon itself, Comcast and other cable MSOs. Obviously the word "unrelated" has an exactly opposite and unique meaning in the Verizon "bubble" to its meaning by the rest of us. The 2002 acquisition involved Comcast of 2002, which is undoubtedly "related" to the Comcast of 2012, the major cable MSO involved in Verizon's currently proposed transactions, which is still the owner of the cable assets acquired from AT&T ten years ago. The 2002 deal also involved AT&T, which as shown below and in our *ex parte* filing, has a role that is "related" to the consequences if these transactions are approved. Finally, Verizon's own arguments *against* the 2002 Comcast acquisition - with some of the names of the individual staff participants changed - are exactly the same as, and therefore "related," to the arguments against approval of the Verizon/cable transactions in 2012, as we clearly and unambiguously demonstrated in our *ex parte* filing.

Evidence of Contradictory Statements by Verizon and the Cable MSOs

Verizon has ignored the evidence IAE presented of contradictory statements between itself and its cable partners concerning questions such as whether the spectrum transfer and the other Agreements between Verizon and the cable MSOs are completely separate transactions or are coordinated elements of an integrated business strategy. Verizon also neglects to clarify its contradictory positions on interoperability, which in some venues it has proclaimed is good for consumers and the services that they can enjoy, while at the same time it is supporting and taking unilateral, action to deploy non-interoperability in the 700 MHz band, without prior regulatory approval from or even as far as we know discussion with the FCC.

B. The Evidence Misrepresented and/or Misunderstood

Relevance of, and IAE's Role in, Non-Interoperability in the 700 MHz Band

Verizon criticizes IAE for NOT filing Comments in the FCC's Interoperability NOPRM Proceeding. It then speculates about our motives, saying we "... are more concerned about interfering with this transaction than about addressing device interoperability itself." Also, Applicants claim that issues relating to the interoperability of 700 MHz devices are not relevant, and should be addressed in the separate proceeding on the interoperability NOPRM. This assertion of our not contributing to the discussion of interoperability is incorrect as is demonstrated on the record. We are deeply concerned about interoperability and conducted an *ex parte* meeting on interoperability with Wireless Telecommunications Bureau staff on January 18, 2012, prior to the release of the latest Interoperability NOPRM (see letter from Alan Pearce to Marlene Dortch, Dated January 23, 2012 under WT Docket No. RM-11592). We also discussed and assessed the adverse impact of non-interoperability on competition and customers, both nationally and globally, as evidenced in a report IAE prepared for the Rural Cellular Association (RCA) in November 2011⁴,. Moreover, our concerns about non-interoperability were already

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 $^{^4}$ Martyn Roetter, Alan Pearce, and Barry Goodstadt, November 2011, "Non-Interoperability at $700~\mathrm{MHz}$: Lower

made manifest in an article that we published in January 2012, which was provided to the FCC before it launched the NOPRM on this subject⁵.

The relevance of non-interoperability to this proceeding is clear <u>because Verizon has made it so</u>. That is, Verizon announced that it would auction off spectrum in the Lower Band A and B blocks of 700 MHz, <u>contingent upon this proposed spectrum transfer being approved</u>. Why would Verizon propose to do such a thing? It is not just to "sweeten" the deal by opening up more spectrum for other players, thereby winning FCC approval. Rather, it is also because spectrum in the A and B blocks is not interoperable with Verizon's own major spectrum holdings in the 700 MHz upper C block and is therefore less useful for its own purposes. It would therefore be more lucrative to sell to others (particularly to the most financially powerful, cash rich player, AT&T, which already has substantial holdings in the B block). It should also be noted that we are not claiming proof of tacit coordination here, although this proposed does have more than a passing resemblance to such a tactic. The outcome of this auction could well be to cement a situation in which the 700 MHz band became for all practical purposes two separate non-interoperable bands, the Lower one controlled by AT&T and the Upper one by Verizon.

As noted above, Verizon has criticized our motives and those of our "backers," suggesting that we "... are more concerned about interfering with this transaction than about addressing device interoperability itself." We have shown above that we have indeed contributed to the interoperability discussion. Furthermore, it should be noted that criticism of our motives and "those of our backers" is completely inappropriate because it is inaccurate. We have made it clear that we have done all of this work to date (both in this Proceeding and in the interoperability ex parte) on a *pro bono* basis, which excludes the presence or contribution from "backers".

Open Devices and Open Applications Conditions in the 700 MHz Upper C Block

Verizon claims that there was no specific interoperability requirement across the 700 MHz band and therefore no violation of the open devices and open applications conditions that apply to its Upper C Block frequencies. This statement ignores the fundamental point that interoperability in a frequency band has been established practice and public policy in the US ever since the introduction of cellular mobile communications services in the early1980s. Hence, the burden of proof lies upon those (Verizon and AT&T) who claim that there should be non-interoperability and have nevertheless introduced it unilaterally (each in its own sub-band) within and between the Lower and Upper 700 MHz bands, not upon those who are trying to restore interoperability. It would be interesting to learn Verizon's definition and interpretation of the meaning of "open devices" and "open applications", on which it has been silent, and how this squares with its introduction of Verizon-only versions of LTE devices and the blocking of the Google Wallet application on an LTE-equipped Samsung smartphone⁶.

Revenues & Higher Prices," IAE report prepared for the RCA

⁵ Alan Pearce, Martyn Roetter, and Barry Goodstadt, "Critical Issues & Questions for FCC: Erosion of Interoperability in 700 MHz Band," BNA Daily Report for Executives, January 30, 2012

⁶ http://technorati.com/technology/android/article/samsung-galaxy-nexus-review/ (April 19, 2012)

AT&T's Role

Verizon describes our forecast that AT&T will enter into similar arrangements with cable MSOs as "crystal-ball speculation." Yet we raised this prospect on the basis of a specific and clearly referenced statement by Randall Stephenson, AT&T's CEO. If the Verizon/cable transactions are approved there will be no obstacle to AT&T's entering into such arrangements. So it is reasonable, not "speculative", to forecast that AT&T will do so if it can, and it will be to its competitive advantage, as Verizon has obviously decided is the case for its collaboration with its traditional cable competitors.

True crystal-ball speculations, or hypotheses not based on and indeed flying in the face of all available evidence, would be any forecasts that Verizon and AT&T would:

(i) Embrace a reversal of the FCC's decision in 2005 to consider the broadband market as falling outside the FCC's traditional areas of regulatory jurisdiction, and/or (ii) Refrain from behavior and actions that operators, other than its allies, would find to be anti-competitive, and (iii) Even reverse their traditional opposition to the FCC's initiatives in areas such as data roaming.

Definition of a Cartel

Applicants dismiss all of our depictions of the outcome of approval of Verizon's transactions with four major cable MSOs as a cartel on the basis of the definition of a cartel as: "[a] combination of producers or sellers that join together to control a product's production or price." It then states that there is nothing contained in the Commercial Agreements or the establishment of a Joint Operating entity that fits this definition, i.e., involves control of the production or prices of Verizon's or the cable MSOs' products by each other.

We can only assume that the authors of this assertion have no idea, or are willfully ignoring, how competitive commercial markets and product development and supply actually work. While we have not been able to obtain access to the redacted details of these aspects of the Verizon/cable transactions, nevertheless it is clear that they involve joint sales and marketing (which has already begun in some cities as we have found, even while the transactions have not yet been approved) of bundled services packages with contributions from two members of the cartel depending on their geographic presences, that compete with the services offered by competitors to the cartel members. In addition the Applicants propose to develop new patentable technologies in a vehicle they own – not an open standards organization – that are aimed at the future better integration of wireline- with wireless-based services. These new technologies will then also be offered in competition with those of non-members of the cartel.

It is inconceivable and contrary to all reasonable expectations and commonsense knowledge of product or services development, sales, and marketing to assume that these initiatives will not involve and indeed require coordination of products and services with respect to their launch, supply and pricing (by geography and timing as well as upgrade and replacement, etc.) between members of the cartel. Applicants will be striving to increase their individual and combined market shares, and grow their revenues and profits in the face of whatever competition remains.

If coordination of this scope and intensity between major players who already enjoy a combined dominance of around 90% in fixed broadband services in multiple areas of the US does not constitute a cartel and justify an antitrust investigation then the very concepts of "cartel" and "antitrust" lose any practical meaning, not only within the Telecommunications-Information-Entertainment sector, but more broadly for any sector of the US economy.

It would be more intellectually honest for Verizon and its allies to adopt the extreme position advocated by some economists that there is, and can be no such thing, as an anti-competitive cartel, and that all antitrust legislation should be abolished, than to maintain the pretense, as Verizon is now doing, that approval of what is proposed in the Verizon/cable transactions would not lead to the formation of a cartel in the true meaning of that word under current legislation. In sum, "if it talks like a cartel, works like a cartel and attacks competitors like a cartel, then it is a cartel."

Status and Prospects of the US Broadband Market

Applicants dismiss IAE's analysis of the status of the US broadband market and concerns for its future health by simply stating that it is ".... criticism that is at odds with the Commission's own findings about the growth of broadband." Could the Applicants actually have missed reading the Executive Summary of the National Broadband Plan, developed by the FCC, which stated (page one of the Executive Summary): "the United States is behind many advanced countries in the adoption of such technology"? We are not aware, and the Applicants fail to specify, where the Commission has found that the US is today a leader in broadband on a global basis, which is the issue and finding on which we focused our attention. This remark by the Applicants is quite remarkable and reflects the Applicants' inability to fully appreciate the situation in which the American public finds itself.

Applicants are unwilling or unable to offer any evidence to contradict a key finding that we have documented, namely that, at best, the US is today in the middle of the pack regarding the capabilities, performance and pricing of the broadband services available to its residents, whether over fixed or mobile access networks. Furthermore, the Applicants ignore our observation that Verizon always uses mobile voice usage and pricing when comparing the US with other countries, instead of mobile broadband services that present a different picture of the relative standing of the US. Perhaps Verizon

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⁷ Connecting America: The National Broadband Plan, Federal Communications Commission, March 2010.

would simply argue that mobile broadband pricing is just another "irrelevant" consideration for the review of its proposed acquisition of AWS spectrum in which it plans to deploy LTE.

Evidence of Relevance of the Connections between the Past, Present, and the Future

In general Verizon rejects the validity and/or relevance of the multiple mutually reinforcing connections that we presented between its actions and those of its proposed cable TV partners over time. We have depicted a clear and unmistakable pattern of a relentless and steady march towards the reduction, and now proposed imminent elimination, of effective competition in the US broadband market. A major initiative such as that which is proposed between Verizon and its traditional competitors in the broadband market - the leading cable MSOs - cannot and must not be adequately reviewed without taking account of the:

- (i) Circumstances leading up to and surrounding its formulation, as well as
- (ii) The most and highly probable consequences of its approval.

These consequences include the foreseeable elimination of both intra-modal and inter-modal competition in transport services if the new collaborative relationships between Verizon and the cable MSOs are implemented, as well as the potential abuses of the growing power, capabilities and applications of Deep Packet Inspection (DPI) technology in an unregulated market. Verizon and its cable partners would evidently prefer, and are arguing, that any initiative that they propose should be evaluated as if it were a completely isolated event, with NO connection to anything that came before (ignore the lessons of history), or is going on at the same time (non-interoperability in the 700 MHz band, a spectrum transfer and a set of commercial agreements and a new development entity involving the same set of Applicants), and/or to reasonable judgments about what may happen in the future, based on evidence from the Applicants' own documented behavior and statements.

Of course Verizon and the other Applicants have to base critical investment decisions on what they believe is the likely future, for example demand forecasts, and to apply judgments and set priorities based on their risk/reward and probability assessments. By the same token it would be irresponsible, as well as illogical, if decisions in major regulatory and antitrust proceedings by the FCC and DOJ paid no attention either to evidence about past behavior and outcomes ("fool me once shame on you, fool me twice shame on me") and/or to plausible and legitimate concerns about the future consequences of alternative choices, justifying this blinkered narrow approach on the grounds that all that is past is "irrelevant" while everything in the future can only be "crystal-ball speculation." For example, should ongoing debates about the need for new or modified laws on privacy ignore the possibilities for the abuse of privacy in the age of the broadband Internet that were not possible before the age of Google and Facebook, simply accepting that these companies can always be trusted to do the "right thing" with the enormous and growing amount of potentially valuable information they collect on hundreds of millions and even billions of individuals' actions and behavior?

The urgency and imperative of developing perspectives on the pros and cons of the proposed transactions and their alternative outcomes, based both upon the past, and upon the best possible insights into future possibilities (which is what demand forecasts have to do), in the context of the proposed Verizon/cable transactions, is heightened by the fact that the Applicants have consistently maintained that their broadband activities do, and should continue to lie, outside the jurisdiction of the FCC. Applicants repeatedly invoke the FCC's 2005 decision about the "effectively competitive" nature of the broadband market, in contrast to more traditional telecommunications services, one in which they had a strong hand in influencing. Thus as soon as, and if and when the proposed transactions are approved, these new partners will have NO compunction or restraints on their ability to exploit their enormous and greatly expanded post-approval market power in any way they see fit, with no possibility or channel of effective and timely recourse by much smaller competitors, OTT players, or consumers, who may find or feel that they are being badly treated or even abused. Their only path to redress and repair will lie through expensive and time-consuming litigation. In the technologically and commercially dynamic world of broadband, and the potentially innovative services and applications that depend on broadband, the impact of such litigation, even if ultimately successful, can at best be effective in installing obsolete locks on barn doors long after the anti-competitive horses have bolted, and the consequences of their escape have irrevocably damaged other businesses' and consumers' interests.

The consequences of approval of the proposed Verizon/cable transactions, for example monopolies of fixed broadband supply in multiple areas in the US for "average," or even future "below average" speeds, are already clearly visible in the short term. Moreover, other harmful consequences in the longer term are easily foreseeable without any stretch of the imagination (let alone crystal-ball speculation) from a simple extrapolation and continuation of the strategies and behavior of these protagonists in an unregulated broadband market. For example, in this market there will be no countervailing restraints on the tactics the cartel's members will be able to employ in order to frustrate any innovative initiatives from non-members that the cartel deems to be not in their collective interests, regardless of the value these innovations may bring to customers.

C. Conclusion

Verizon's attempts to discredit IAE's findings and conclusions fail utterly and completely on two counts:

First, they ignore several of the key pieces of evidence and analyses that we presented as compelling reasons to justify the rejection of its proposed transactions with the Cable MSOs and the conclusion that any assertions and claims made by Verizon and its cable partners should be viewed with extreme suspicion and skepticism as to their validity.

Second, they misrepresent and fail to grasp or acknowledge (deliberately or otherwise) the thrusts and implications of the other evidence and analyses that IAE provided. Rebutting, let alone refuting, an opponent requires much more than simply fulminating about the opposition's positions as "meritless",

and/or "irrelevant", and/or "unrelated," without presenting any countervailing evidence or contradictory facts.

We are surprised at the extremely flimsy and unconvincing content and tone of this rebuttal by the Applicants, organizations that possess enormous talent and expertise. Verizon and its proposed cable TV partners are able to apply formidable resources to influence the course of any debate or controversy that dwarf those that IAE can muster for a *pro bono* research project designed to protect and promote the public interest. Despite all their resources the Applicants seem unable to find convincing evidence and/or arguments to refute our opposition, because there are none. In addition the absence of any convincing rebuttal of our exposure of the fundamental flaws and misrepresentations in their filings, along with other assertions and the demonstrably collusive and anti-competitive agendas and motivations behind these transactions, indicates the true nature of these companies' strategy for securing their approval.

Verizon and the cable MSOs are simply relying on applying their formidable financial and other resources and influence to trump and override any opposing arguments based on logic, network engineering considerations, and the findings of independent, objective, and fact-based analyses.

Should any additional information be required with respect to this *ex parte* please do not hesitate to contact me.

Very truly yours,

/s/ Alan Pearce

Alan Pearce, Ph.D.
Information Age Economics
202-466-2654
IAEPearce@aol.com

APPENDIX

The FCC has defined multiple speed tiers for broadband services as shown in this Table. Thus in areas where Verizon and AT&T have chosen not to deploy FiOS and Uverse respectively, yet continue only to offer DSL-based services, the local cable operator will effectively and may already enjoy a monopoly of services at Tier 4 and above, and for some residences in these areas for services as low as Tier 3.

| Tier | Name | Speed range |
|-------------|----------------------------|--------------------|
| Sub-0 -0 | Non-broadband product | Under 200kb/s |
| 0 | First-generation broadband | 200Kb/s to 768Kb/s |
| 1 | Basic broadband tier 1 | 768Kb/s to 1.5Mb/s |
| 2 | Basic broadband tier 2 | 1.5Mb/s to 3Mb/s |
| 3 | Broadband tier 3 | 3Mb/s to 6Mb/s |
| 4 | Broadband tier 4 | 6Mb/s to 10Mb/s |
| 5 | Broadband tier 5 | 10Mb/s to 25Mb/s |
| 6 | Broadband tier 6 | 25Mb/s to 100Mb/s |
| 7 | Broadband tier 7 | more than 100Mb/s. |